

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION**

BENITA D. NESBY,

vs.

ALL COMMERCIAL FLOORS

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CIVIL ACTION No. 4:22-CV-167-P (BJ)

**FINDINGS, CONCLUSIONS AND RECOMMENDATION OF THE
UNITED STATES MAGISTRATE JUDGE AND NOTICE AND ORDER**

(With Special Instructions to the Clerk of Court)

In this case, Plaintiff has filed a civil case with a motion for leave to proceed *in forma pauperis*. Resolution of the motion was referred to the United States Magistrate Judge pursuant to the provisions of 28 U.S.C. § 636(b) and Miscellaneous Order No. 6.¹ The findings, conclusions and recommendation of the United States Magistrate Judge are as follows:

FINDINGS AND CONCLUSIONS:

A. NATURE OF THE CASE

This case is a new civil action.

B. PARTIES

Benita D. Nesby is the plaintiff. The defendant listed by Plaintiff is All Commercial Floors. ECF No. 1.

C. LEGAL ANALYSIS

Plaintiff accompanied her civil complaint with a fully completed long-form motion to proceed in forma pauperis under 28 U.S.C. § 1915 *et. seq.* ECF No. 2. That motion/application includes the income and asset information for the plaintiff. A review of the financial information

¹Order for the Adoption of Rules for the Exercise of Powers and Performances of duties by United States Magistrate Judges, signed May 5, 2005.

submitted in the long-form application/motion reflects that Plaintiff presently receives unemployment in the amount of \$2,200 per month. ECF No. 2 at 2. Courts consistently consider unemployment compensation in making the in-forma-pauperis determination.² Plaintiff also reports receiving social security disability income. ECF No. 2 at 2. Courts also consider social security type benefit payments in making the in-forma-pauperis determination.³ Plaintiff lists no dependents, but otherwise references a “minor son,” so the Court will assume she has a family of two for purposes of the applicable poverty guidelines. Such guideline for a family of two is \$18,310. With the income from unemployment compensation and social security payments, Plaintiff’s available monthly financial support of \$4,102 and annualized to \$49,224, is significantly above the poverty level. The information in this application thus shows that Plaintiff has sufficient resources available to pay the applicable fees. Thus, after review and consideration of the application/motion to proceed in forma pauperis, the undersigned finds the motion to proceed IFP should be denied, and will make such a recommendation.

RECOMMENDATION

It is therefore **RECOMMENDED** that Plaintiff’s March 7, 2022 motion to proceed in forma pauperis [ECF No. 2] be **DENIED** by the district judge.

²See, e.g., *Cornish v. Texas Dept. of Protective and Regulatory Service*, No. 3:04-CV-969-K, 2004 WL 1305809, at *1 (N.D. Tex. June 10, 2004), *rep. and rec. adopted*, 2004 WL 1819018 (Aug. 12, 2004); *Grant v. Shiflett*, No.3:03-CV-1959-R, 2003 WL 22466210, at *1 (N.D. Tex. Oct. 23, 2004), *rep. and rec. adopted*, (November 12, 2004); *Ponder v. Schultz*, No.3:02-CV-1353-P, 2002 WL 3114054, at *2 (N.D. Tex. Sep. 20, 2002).

³See, e.g., *Lewis v. Center Market*, 378 F. App’x 780, 784-85 (10th Cir. May 17, 2010) (affirming district court’s denial of IFP status to appellant whose only income sources were social security and unemployment benefits); *Salter v. Johnson*, No.3:12CV738-HTW, 2013 WL 550654, *1 (S.D. Miss. Jan. 18, 2013) (noting that income includes social security payments), *rep. and rec. adopted*, 2013 WL 55065 (Feb. 12, 2013); *Mitchell v. Champs Sports*, 42 F.Supp. 2d 642, 648 (E.D. Tex. Dec. 15, 1998).

It is further **RECOMMENDED** that the district judge inform Plaintiff that the complaint will be subject to dismissal without further notice under Federal Rule of Civil Procedure 41(b), unless Plaintiff pays to the clerk of Court the filing and administrative fees of \$402.00⁴ within seven (7) days after the district judge's order.

**NOTICE OF RIGHT TO OBJECT TO PROPOSED
FINDINGS, CONCLUSIONS AND RECOMMENDATION
AND CONSEQUENCES OF FAILURE TO OBJECT**

A copy of this report and recommendation shall be served on all parties in the manner provided by law. Under 28 U.S.C. § 636(b)(1), each party to this action has the right to serve and file specific written objections in the United States District Court to the United States Magistrate Judge's proposed findings, conclusions, and recommendation within fourteen (14) days after the party has been served with a copy of this document. The United States District Judge need only make a de novo determination of those portions of the United States Magistrate Judge's proposed findings, conclusions, and recommendation to which specific objection is timely made. *See* 28 U.S.C. § 636(b)(1). Failure to file by the date stated above a specific written objection to a proposed factual finding or legal conclusion will bar a party, except upon grounds of plain error or manifest injustice, from attacking on appeal any such proposed factual findings and legal conclusions accepted by the United States District Judge. *See Douglass v. United Servs. Auto Ass'n*, 79 F.3d 1415, 1428–29 (5th Cir. 1996) (en banc), *superseded by statute* 28 U.S.C. § 636(b)(1) (extending the deadline to file objections from ten to fourteen days).

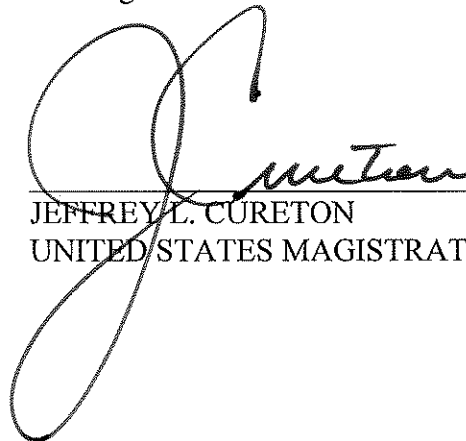
⁴In addition to the filing fee of \$350, the District Court Miscellaneous Fee Schedule requires payment of an administrative fee for filing a civil action in district court of \$52. *See* 28 U.S.C. § 1914(a) and District Court Miscellaneous Fee Schedule, note 14.

ORDER

Under 28 U.S.C. § 636, it is **ORDERED** that Plaintiff is granted until March 22, 2022 to serve and file written objections to the United States Magistrate Judge's proposed findings, conclusions and recommendation.

It is further **ORDERED** that the above-styled and numbered action, previously referred to the United States Magistrate Judge for findings, conclusions and recommendation, be and is hereby, RETURNED to the docket of the United States District Judge.

SIGNED March 8, 2022.



JEFFREY L. CURETON
UNITED STATES MAGISTRATE JUDGE